

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANDREA M NEBERGALL
Claimant

SIMPLY TREES LLC
Employer

APPEAL 18A-UI-04688-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/11/18
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 28, 2018 (reference 01) unemployment insurance decision that denied benefits based upon her voluntarily quitting work without good cause attributable to the employer. The parties were properly notified of the hearing. A telephone hearing was held on May 22, 2018. The claimant, Andrea M. Nebergall, participated personally and was represented by attorney Elizabeth A. Norris. LaDonna Poggenpohl participated as a witness on behalf of the claimant. The employer, Simply Trees LLC, did not participate. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

ISSUES:

Did the claimant file a timely appeal?
Did claimant voluntarily quit the employment with good cause attributable to employer?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

An unemployment insurance benefits decision was mailed to the claimant on or about March 28, 2018 (reference 01) that found claimant was not eligible for unemployment insurance benefits because she voluntarily quit her employment. Claimant did not receive this decision in the mail. Another unemployment insurance benefits decision was mailed to the claimant on or about April 9, 2018 that found claimant was overpaid benefits. Claimant did receive this decision in the mail. Claimant visited her local Iowa Workforce Development ("IWD") office on April 19, 2018 and filed an appeal to both decisions. Claimant had moved to a new address on April 1, 2018. She updated her address with IWD on April 19, 2018, when she visited the local office.

Claimant was employed full-time as a grounds worker for this employer. She began working on March 3, 2017. Larry Bohnenkamp was claimant's supervisor. Her last day physically worked on the job was Monday, January 8, 2018. Claimant alleges that she was laid off due to lack of

work. However, she was supposed to work on Tuesday, January 9, 2018 but did not go to work due to lack of transportation.

Claimant had a conversation with Mr. Bohnenkamp the evening of January 8, 2018 and he told her that he would give her a ride to work the next day. The claimant's personal vehicle was either not working or was taken away on or about January 5, 2018 and she did not have transportation to work. She had received a ride to work from a co-worker on January 8, 2018.

Mr. Bohnenkamp had given the claimant a ride to work approximately 4-5 times during the time that she had worked there. On January 9, 2018, when Mr. Bohnenkamp did not pick claimant up for work he called her and asked why she was not at work. She told him that she was not at work because he did not pick her up to take her to work. He told her that it was not his responsibility to get her to work. Claimant did not return to work after January 8, 2018 for any further scheduled shifts.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

The first issue to be addressed is whether the claimant filed a timely appeal. The administrative law judge finds that the claimant did file a timely appeal.

Iowa Code § 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

An appeal must be filed within ten days after notification of that decision was mailed. Iowa Code § 96.6(2). The Iowa Supreme Court held that compliance with the appeal notice provision is mandatory and jurisdictional. *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979).

Iowa Admin. Code r. 871-24.35(1) provides:

Date of submission and extension of time for payments and notices.

(1) Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:

a. If transmitted via the United States postal service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

b. If transmitted by any means other than the United States postal service on the date it is received by the division.

Iowa Admin. Code r. 871-24.35(2) provides:

Date of submission and extension of time for payments and notices.

(2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The division shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

The claimant has established that she did not receive the decision that found her ineligible for benefits. This delay or other action of the United States Postal Service establishes good cause reason for her late appeal filing. Iowa Admin. Code r. 871-24.35(2). Therefore, the appeal shall be accepted as timely.

The next issue is whether the separation from employment disqualifies claimant from the receipt of unemployment insurance benefits. The administrative law judge finds that it does.

Iowa Code §96.5(1) provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

It is clear that claimant was not laid off due to lack of work because she was supposed to be at work on January 9, 2018 for her scheduled shift. As such, it must be determined whether claimant quit or was discharged from employment. A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

Claimant lost her transportation to work effective January 5, 2018 when her vehicle was either taken away or quit working. She received a ride to work with a co-worker the next working day on January 8, 2018. She did not have transportation to work after January 8, 2018. She failed to continue going to work due to lack of transportation. Claimant's failure to go to work was job abandonment. As such, claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973).

In this case, claimant voluntarily quit because she did not have transportation to work when her personal vehicle was no longer available to her for an unknown reason. This was not a case where the employer had provided a company vehicle to the claimant to use and then restricted her from using it, or, where there was a clear pattern of the employer furnishing transportation to the claimant on a regular basis. While Mr. Bohnenkamp may have agreed to give claimant a ride to work on January 9, 2018 and then failed to do so, his comment that it was not his responsibility to get her to work clearly put claimant on notice that he was not going to furnish transportation to her. Claimant had only received 4-5 rides from Mr. Bohnenkamp during the ten-month period that she worked there. Claimant received a ride to work from a co-worker on January 8, 2018, not Mr. Bohnenkamp. Once claimant was on notice that the employer had not agreed to furnish transportation for her, it was her responsibility to get to work. She failed to report to work for any further shifts after January 8, 2018.

Iowa Admin. Code r. 871-24.25(1) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(1) The claimant's lack of transportation to the work site unless the employer had agreed to furnish transportation.

The claimant's voluntary quitting was not for a good-cause reason attributable to the employer according to Iowa law. Benefits must be denied.

DECISION:

The claimant filed a timely appeal. The March 28, 2018 (reference 01) unemployment insurance decision is affirmed. Claimant voluntarily quit employment without good cause attributable to the employer. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs